RECORD AND BRIEFS

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In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

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TABLE OF CONTENTS

Page

Statement 2
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605 (1983) 13
Colorado v. *Kansas*, 320 U.S. 383 (1943) 14
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) 14
Kentucky v. *Indiana*, 445 U.S. 941 (1980) 15
Nebraska v. *Wyoming*, 515 U.S. 1 (1995) 13
New Hampshire v. *Maine*, 426 U.S. 363 (1976) 15
New Jersey v. *New York*, 345 U.S. 369 (1953) 9, 10, 11, 14
South Carolina v. *North Carolina*, 558 U.S. 256 (2010) 9, 11, 12, 13, 14
United States v. *California*, 377 U.S. 926 (1964) 15

Treaty, statutes and rule:

Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 3
art. I, 34 Stat. 2953-2954 3
art. II, 34 Stat. 2954 3
Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 2
Act of June 17, 1902, ch. 1093, 32 Stat. 388 2
Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... 1, 4
Preamble, 53 Stat. 785 1
Art. I(k), 53 Stat. 786 4

Statutes and rule—Continued: Page

Art. I(*l*), 53 Stat. 786 4
Art. IV, 53 Stat. 788 4
N.M. Stat. Ann. § 73-10-16 (1978) 6, 10
Fed. R. Civ. P. 12(b)(6) 5

Miscellaneous:

Bureau of Reclamation, U.S. Dep't of the Interior:
Operating Agreement for the Rio Grande Project (Mar. 10, 2008), http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/OperatingAgreement2008.pdf. 3
Supplemental Environmental Assessment: Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf 4
Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* (Feb. 1938) 2, 3

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This action concerns the interpretation of the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Preamble, 53 Stat. 785. On January 27, 2014, the Court granted Texas's motion for leave to file a bill of complaint against the States of New Mexico and Colorado. 134 S. Ct. 1050. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. 134 S. Ct. 1783. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. On November 3, 2014, this Court appointed A. Gregory Grimsal as Special Master, with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent

proceedings, and to submit reports as he deems appropriate. 135 S. Ct. 474.

On December 3, 2014, Elephant Butte Irrigation District (EBID) filed, in this Court, a motion for leave to intervene. EBID is a quasi-governmental organization created under New Mexico state law. Through a contract with the United States, EBID has a managerial responsibility to deliver water from the Bureau of Reclamation's (Reclamation's) Rio Grande Project (the Project) to EBID members, who are agricultural water users within its service area. In the view of the United States, EBID does not satisfy this Court's standard for intervention by a non-State entity, and EBID's motion for leave to intervene should therefore be denied.

STATEMENT

1. The Reclamation Act of 1902 provided authorization and funding for irrigation works in various States, including New Mexico. See Act of June 17, 1902, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. Construction of the Project began in 1910. Elephant Butte Reservoir, the largest storage facility in the Project, was completed in 1916. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73, 83 (Feb. 1938) (*Joint Investigation*). Elephant Butte Reservoir is in New Mexico, approximately 105 miles north of the Texas border.

In 1906, Reclamation entered into contracts with two irrigation districts: the entities now known as EBID in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas. Those contracts provide for the irrigation of approximately 155,000 acres of land—67,000 acres in Texas, and 88,000 acres in New Mexico. *Joint Investigation* 73, 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. See U.S. Br. in Opp. to N.M. Mot. to Dismiss App. 1a-4a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico.

The Project also delivers water to Mexico pursuant to the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. *Id.* arts. I & II, 34 Stat. 2953-2954.

Today, Reclamation continues to calculate diversion allocations under the Project pursuant to the treaty and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement entered into by Reclamation, EBID, and EPCWID. See Bureau of Reclamation, U.S. Dep't of the Interior, *Operating Agreement for the Rio Grande Project* (Mar. 10, 2008) (2008 Operating Agreement), http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/OperatingAgreement2008.pdf. Under the 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for "return flows," from a given

volume of water released from Project storage based on 1951-1978 hydrological conditions. See Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment: Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 13-14, 18.

On March 18, 1938, the parties signed the Compact, and Congress approved the Compact the following year. 53 Stat. 785. Article IV of the Compact required New Mexico to deliver water at San Marcial, New Mexico—a gauging station upstream of Elephant Butte Reservoir—in an amount that is determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission changed the gauge for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. para. 13; N.M. Br. in Opp. 1 n.1. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "Project Storage" for purposes of the Compact, Art. I(k), 53 Stat. 786), it becomes "Usable Water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

2. In its complaint, Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal

contracts. Tex. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground," downstream of Elephant Butte Reservoir in New Mexico. *Id.* para. 18.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact: (1) the parties' dispute concerns water released from a federal project for which Reclamation sets the diversion allocations for the irrigation districts downstream of Elephant Butte Reservoir; (2) the United States has an interest in ensuring that New Mexico water users who do not have contracts with the Secretary of the Interior (Secretary) for delivery of Project water, or who use Project water in excess of contractual amounts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries; and (3) the United States has an interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See U.S. Mem. in Supp. 5-8.

New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon

which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's water rights below Elephant Butte are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61).

3. On December 2, 2014, EBID filed, in this Court, a motion for leave to intervene. EBID is an irrigation district created under New Mexico law, and its boundaries lie wholly within New Mexico. N.M. Stat. Ann. § 73-10-16 (1978). It was created to be Reclamation's fiscal agent, to operate and maintain federal Reclamation facilities within its boundaries, and to deliver Project water to end users in New Mexico. *Ibid.*

The motion does not specify whether EBID seeks leave to intervene as a plaintiff or as a defendant. EBID explains (Mem. in Supp. 26) that it agrees with Texas (and thus disagrees with New Mexico) that "the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law, and therefore * * * this Court is the appropriate forum in which to resolve the dispute." EBID further contends (*id.* at 30-32), however, that Texas's complaint should be dismissed because the Compact "does not apportion Rio Grande water to Texas, much less apportion water based on 1938 conditions." In EBID's view (*id.* at 33-35), the Compact's "apportionment of water between New Mexico and Texas water users in the Project area [is] addressed by the con-

tract between the United States and the water districts," and that contract was modified by the 2008 Operating Agreement so that "the baseline for groundwater pumping in New Mexico" reflects conditions existing in 1951-1978.

EBID contends (Mem. in Supp. 20-23) that it has a compelling interest in its own right, distinct from its interest in a "class" with other New Mexico entities, to warrant intervention as an independent party in this original action. EBID describes its interests as follows: (1) EBID has significant responsibilities in carrying out the functions of the Project, such as determining how EBID's share of the Project water is allocated among its members, delivering Project water to end users in New Mexico, operating and maintaining the Project's diversion structures and drainage system, and "coordinat[ing] the delivery of [the Texas portion of] Project water to EPCWID" by virtue of being an upstream irrigation district (*id.* at 20-22); and (2) EBID "represents the Project water users in New Mexico who have the 'beneficial interest' in the Project's water rights" (*id.* at 22-23).

EBID further contends (Mem. in Supp. 24-29) that its interests are not adequately represented by the existing parties. EBID explains that "EBID and New Mexico take divergent positions on several major issues," including: (1) whether the 2008 Operating Agreement is consistent with the Compact (*id.* at 24-25); (2) whether return flows and seepage from the Project belong to the Project or instead are public waters subject to appropriation under New Mexico law (*id.* at 26); and (3) whether federal or state law governs the allocation of Rio Grande water below Elephant Butte Reservoir (*ibid.*).

EBID further contends (Mem. in Supp. 28-29) that its interests are not adequately represented by the United States because, according to EBID, "EBID—not the United States—is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas." *Id.* at 28.

Finally, EBID contends (Mem. in Supp. 29) that it should be allowed to intervene because its "arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in this case." EBID sets forth its position (*id.* at 29-33) that the Compact does not apportion any Rio Grande water to Texas but instead apportions water among Colorado, New Mexico, and *the Project*, which then divides Project water according to contracts. Those contracts, EBID contends, have been modified by the 2008 Operating Agreement, which "is a form of federal law." *Id.* at 34. EBID further sets forth its view (*id.* at 36-39) that the Project is entitled to return flows and seepage until the seepage "percolate[s] into the ground and become[s] part of the native groundwater supply in the underlying aquifer," at which point (according to EBID) it becomes public water available for appropriation under New Mexico state law.

ARGUMENT

This Court has held that "[a]n intervenor whose state is already a party * * * ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not

properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The standard for intervention in original cases by non-State entities "is high—and appropriately so," because original actions "tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" and because "respect for sovereign dignity" of the States, which "represent[] the interests of [their] citizens in an original action," "counsels in favor of restraint" in allowing non-State entities to intervene. *South Carolina* v. *North Carolina*, 558 U.S. 256, 267 (2010). EBID has identified no compelling interest, that is not adequately represented by the existing sovereign parties, to justify its participation as an independent party in this dispute.

1. EBID contends (Mem. in Supp. 20-22) that it has a unique interest in this case, distinct from other New Mexico citizens, because it assists the United States in carrying out the functions of the Project by determining how EBID's share of the Project water is allocated among its members, delivering Project water to end users in New Mexico, operating and maintaining the Project's diversion structures and drainage system, and "coordinat[ing] the delivery of [the Texas portion of] Project water to EPCWID" by virtue of being an upstream irrigation district. *Id.* at 22. But EBID's managerial role in operating Project facilities in New Mexico is not relevant to this dispute over the States' respective rights under the Compact.

The complaints filed by Texas and the United States seek to establish the sovereign rights among the States, the nature of the apportionment of water agreed to by the States under the Compact, and the rights of the United States on behalf of the Project

and under the treaty with Mexico. EBID is not a party to the Compact, and it acknowledges (Mem. in Supp. 13, 21) that the United States owns and operates the Project's dams and reservoirs and determines how much water is allocated to EBID and EPCWID, respectively, pursuant to the 1938 contract and the 2008 Operating Agreement. EBID's responsibility to manage Project deliveries within New Mexico after the Secretary determines EBID's share of the water has no effect on how the water is allocated among the States. EBID's motion confirms that its role in managing Project water within New Mexico concerns intrastate matters that arise only after the respective rights of the States under the Compact—the subject of the dispute in this suit—are satisfied.

2. a. Furthermore, EBID is a quasi-governmental entity created under New Mexico law, and its boundaries lie wholly within New Mexico. N.M. Stat. Ann. § 73-10-16 (1978). Accordingly, respect for the sovereign dignity of New Mexico counsels in favor of denying EBID's motion to intervene. This Court's requirement that an intervenor whose State is already a party must show a compelling interest that "is not properly represented by the state" flows from "the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all of its citizens." *New Jersey* v. *New York*, 345 U.S. at 372-373 (citation and internal quotation marks omitted). Treating the State as the representative of its citizens "is a necessary recognition of sovereign dignity" because it prevents the State from being "judicially impeached on matters of policy by its own subjects." *Id.* at 373. That concern is directly implicated by EBID's motion.

i. EBID contends that its interests are not adequately represented by New Mexico in this case because "EBID and New Mexico take divergent positions on several major issues," including: (1) whether the 2008 Operating Agreement is consistent with the Compact (Mem. in Supp. 24-25); (2) whether return flows and seepage from the Project belong to the Project or instead are public waters subject to appropriation under New Mexico law (*id.* at 26); and (3) whether federal or state law governs the allocation of Rio Grande water below Elephant Butte Reservoir (*ibid.*). That is precisely the type of "impeach[ment] * * * by its own subjects" that the Court has concluded is offensive to State sovereignty and inadequate to warrant intervention by a wholly intrastate entity. *New Jersey* v. *New York*, 345 U.S. at 373; see *South Carolina* v. *North Carolina*, 558 U.S. at 280 (Roberts, C.J., concurring in the judgment and dissenting in part) ("The State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court.") (citations and internal quotations marks omitted).

In *South Carolina* v. *North Carolina*, this Court allowed two non-State entities to intervene in an equitable apportionment action, but each of those entities had unique interstate characteristics that are not present here. The Catawba River Water Supply Project (CRWSP) was "an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States." 558 U.S. at 269. It was a "bistate entity" that was jointly owned and regulated by, and supplied water to, a county in each State, *id.* at 261, and it had "an advisory board consisting of representatives from both counties,"

"revenue[] from its bistate sales," and "infrastructure and assets that [we]re owned by both counties as tenants-in-common." *Id.* at 269; *ibid.* ("It is difficult to conceive of a more purely bistate entity."). The other entity that was permitted to intervene, Duke Energy, "operate[d] 11 dams and reservoirs in both States that generate[d] electricity for the region and control[led] the flow of the [interstate] river," making it "likely that any equitable apportionment of the river w[ould] need to take into account the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region." *Id.* at 272. Duke Energy also held a license from the Federal Energy Regulatory Commission (FERC) for its hydroelectric facilities, which regulated the flow of the river, and Duke Energy sought to protect a consensus agreement of 70 parties in both States, arrived at in connection with the proposed renewal of Duke Energy's FERC license, regarding appropriate minimum flows. *Id.* at 272-273.

In contrast to the non-State entities that were permitted to intervene in *South Carolina* v. *North Carolina*, EBID is an entity that operates only in New Mexico and manages EBID's share of the Project water supply within the State. In this respect, EBID is like the City of Charlotte, which was denied intervention in *South Carolina* v. *North Carolina* because, unlike CRWSP and Duke Energy, it was a North Carolina entity that fell within the general class of water users in that State, and its interests therefore fell "within the category of interests with respect to which a State must be deemed to represent all of its citizens." 558 U.S. at 274.

ii. To the extent EBID contends that it has a unique interest in protecting the Project's water supply, see Mem. in Supp. 21-22 (stating that EBID "bears major responsibilities for * * * effectuating the congressional goal of protecting the integrity and feasibility of the Rio Grande Project"), the United States has already intervened in this action to protect that interest. EBID acknowledges (*id.* at 13, 21) that the United States owns and operates the Project's dams and storage facilities and determines how water is allocated between EBID and EPCWID. EBID's contention (*id.* at 28) that "EBID—not the United States—is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas," does not mean that the United States cannot adequately represent EBID's interest in protecting the Project's overall water supply.

The Court has previously allowed Indian Tribes to intervene in an equitable apportionment action, even though the Tribes' interests were already protected by the participation of the United States. See *Arizona* v. *California*, 460 U.S. 605, 612-613 (1983). But the Court concluded that the Tribes' intervention was warranted because their water rights would be defined by the litigation, and the Tribes, as sovereign entities, were entitled to "take their place as independent qualified members of the modern body politic." *Id.* at 614-615 (citation omitted). EBID, in contrast, is not a sovereign entity with a direct property interest at stake in this litigation. See *Nebraska* v. *Wyoming*, 515 U.S. 1, 22 (1995) ("[W]ater disputes among States may be resolved * * * without the

participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.").

b. In addition to affording proper respect to the dignity of State sovereignty, treating the State as the representative of its citizens is also a "rule for good judicial administration," because "[o]therwise, * * * there would be no practical limitation on the number of citizens * * * who would be entitled to be made parties." *New Jersey* v. *New York*, 345 U.S. at 373.

Even assuming that Compact enforcement actions such as this could be litigated manageably with an expanded number of parties, the expansion could make it significantly less likely that any of these cases of interstate sovereignty could be resolved through negotiation. This Court has repeatedly stated that the preferred approach for resolving interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power." *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943); see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-106 & n.11 (1938). The participation of more parties, particularly parties that advance narrower interests that may conflict with the goals of their States, could impede that goal. See *South Carolina* v. *North Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in the judgment and dissenting in part) ("[I]ntervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement between the States, if not the power to block a settlement altogether.").

3. EBID's contention (Mem. in Supp. 29) that it should be allowed to intervene because its "arguments concerning the issues in this case are different from

the arguments of the other parties, which would help the Court to better understand the complicated issues raised in th[is] case," demonstrates that EBID can play an appropriate role in this litigation as an *amicus curiae*. See *Kentucky* v. *Indiana*, 445 U.S. 941 (1980); *New Hampshire* v. *Maine*, 426 U.S. 363, 365 n.2 (1976); *United States* v. *California*, 377 U.S. 926 (1964). EBID's views on the legal questions presented in this case (see Mem. in Supp. 29-39) can be presented to the Special Master and to the Court through the role of an *amicus curiae* without unnecessarily expanding the standard for intervention by non-State entities in original cases to include intrastate actors with no compelling interest that is not already protected by a sovereign party to the case.

CONCLUSION

EBID's motion for leave to intervene should be denied.

Respectfully submitted.

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